UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,	)	
	)	05-CV-0329 GKF-SAJ
Plaintiffs,	)	
	)	
v.	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

THE CARGILL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER COMPELLING DISCOVERY AT DOCKET NO. 1150

This Court's Order of May 17 mandated significant supplementation of Plaintiffs' document production by June 16, among other rulings. Plaintiffs were to provide a Rule 34(b) supplemental production that "shall insure that a complete and fully accurate index ... show[s] the box number which responds to each specific [request for production]. The responsibility is on Plaintiff to insure that there are no documents in the box that are not responsive to the [production request]." (Order of May 17 at 7.) Rather than attempt to meet the deadline, Plaintiffs seek reconsideration even though they were fully heard on the issues addressed in the Order and were allowed post-hearing briefing on document production arguments. The Court should deny the motion.

Pursuant to the Order, on May 22, the Cargill Defendants sent a letter to Plaintiffs' counsel requesting dates to complete the agency and office document productions and inquiring as to when Plaintiffs would supplement their responses to Cargill interrogatory nos. 9 and 13. (Ex. A.) The Cargill Defendants requested a meet and confer and reiterated their willingness to work with Plaintiffs to prepare a comprehensive schedule for remaining document production.[1] (Id.) Plaintiffs responded to the letter by filing the instant motion seeking relief from the Court's document production rulings.[2]

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[1] Per the Order, the letter also clarified the Cargill Defendants' position on the commingling of defense documents: while the Cargill Defendants do not oppose Plaintiffs' attempts to produce documents in the most reasonable cost- and time-efficient way, any production must clearly identify or segregate documents responsive to the Cargill Defendants' requests. (Ex. A.) The letter concluded by soliciting Plaintiffs' proposals to achieve this goal. (Id. at 2.)

[2] Although the Order also addressed disputes involving interrogatories, ESI, and state agency representation, the reconsideration motion objects only to document production rulings. The parties are currently addressing compliance issues on these other fronts.

I. The Court's Document Production Ruling is Fair and Well Supported.

In the Tenth Circuit, grounds justifying reconsideration of an order are narrow, but include "the need to correct clear error or prevent manifest injustice." Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). Such motions are appropriate when the "court has misapprehended the facts, a party's position, or the controlling law," not where a party merely wants to reargue its case. Id. Here, Plaintiffs allege the Court misapprehended facts and law in ruling (1) that they must provide a complete and fully accurate index showing the box numbers where documents responsive to requests can be found and (2) must produce only responsive materials. (Mot. for Reconsid. at 1-2.)

A. The Court should disregard all arguments that were or could have been raised in the underlying briefing.

Motions for reconsideration that simply revisit previously addressed arguments or "advanc[e] new arguments or supporting facts which were otherwise available for presentation" when the original motion was made are improper and must fail. Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991). Under the "misapprehension" standard, Plaintiffs attempt a third round of argument on many of the same issues vetted in the initial and supplemental briefings on the Cargill Defendants' motion to compel, such as the scope of the Cargill Defendants' discovery requests (Mot. for Reconsid. at 5) and the sufficiency of the pre-motion meet and confers (id.). Section II.E specifically addresses this issue with respect to the newly drafted agency affidavits. Hence, the Court should disregard those portions of Plaintiffs' motion that impermissibly reassert arguments that were or could have been raised in the first rounds of briefing.

B. Plaintiffs' indices and charts are faulty and inadequate.

Plaintiffs contend that this Court "misapprehended the facts by inferring a widespread deficiency of the State's indices based on two isolated instances of inconsequential defects." (Mot. to Reconsid. at 2, emphasis in original.) As a threshold matter, Plaintiffs overlook that the Court's Order already notes that because Plaintiffs represented at the hearing that the mistakes to which the Cargill Defendants pointed in the original index were "isolated occurrences, supplementation should not be an onerous task." (Order of May 17 at 7.) Although Plaintiffs claim their indices and charts have no systematic problems, they oppose any revision. (Mot. for Reconsid. at 5-7.)

In the interest of efficiency and economy, the Cargill Defendants had previously provided the Court with only two examples of faulty charts. Given Plaintiffs' current position, however, the Cargill Defendants have little choice but to provide additional examples of inaccuracy in the indices and charts.[3] For instance:

- Oklahoma Water Resources Board, Office of General Counsel Box 17 contains a folder labeled "Lake Francis Ownership transfer." Although CTP request for production no. 51 specifically seeks documents relating to the ownership of Lake Francis, Plaintiffs' chart fails to list request no. 51 at all. (See Ex. B.)

- Only Plaintiffs' charts for the Office of the Secretary of the Environment and Oklahoma Scenic Rivers Commission ("OSRC") reference the Cargill Defendants' interrogatories. Further, it is impossible to determine whether some entries refer to interrogatories or document requests. (See Exs. C and D.)

- CTP request for production no. 13 seeks Plaintiffs' communications with federal agencies regarding the IRW or allegations in the First Amended Complaint. Plaintiffs designated as responsive only Oklahoma Department of

[3] Again in the interest of efficiency, this Response limits such examples. Should the need arise, the Cargill Defendants can provide as many examples as the Court might wish.

Environmental Quality ("ODEQ") Legal Boxes 6 and 8. However, in response to CTP request for production no. 2 – seeking correspondence with federal agencies regarding water treatment byproducts and water treatment processes in any public water supply located within the IRW – Plaintiffs designated as responsive all eight total ODEQ Legal Boxes. (See Ex. E.)

- Section II.D below details examples of chart references to wholly unresponsive information.

The Cargill Defendants have amply demonstrated the deficiencies in Plaintiffs' charts. If the deficiencies are truly isolated, as Plaintiffs aver, they should be able to remedy them without inordinate burden. If the deficiencies are in fact widespread, Plaintiffs are no less bound to rectify the confusion that ensued from their chosen production system. See, e.g., United States v. Magnesium Corp. of Am., 2006 WL 2222358, at *6 (D. Utah Aug. 2, 2006) (holding that even where a party produces only responsive documents, it remains obligated to provide a key or index if producing a large volume of documents that are problematic to view without some sort of "guidance").

C. The Court should not hear a motion to reconsider based on non-controlling authority, and the Northern District of Georgia holdings actually support the Order.

Plaintiffs err in alleging that the Court misapprehended the law by requiring production of "a complete and fully accurate index" showing "the box number which responds to each specific Motion to Produce." (Mot. for Reconsid. at 1-2; Order of May 17 at 7.) Plaintiffs construe this mandate as a dual requirement, and contend that a producing party may be required only to either 1) direct the requesting party to the file locations where documents responsive to each specific request could be found, or 2) provide a key or index to assist in locating the documents responsive to each request. (Mot. for Reconsid. at 2-4.) In asserting that the Court misapprehended the law by requiring an accurate index that includes

box numbers responsive to each request, Plaintiffs rely exclusively on two unpublished decisions from the Northern District of Georgia.[4] The motion wrongly argues that departure from those holdings is error. (Id. at 3-4, discussing U.S. CFTC v. Am. Derivatives Corp., 2007 WL 1020838 (N.D. Ga. Mar. 30, 2007); Williams v. Taser Int'l, Inc., 2006 WL 183543 (N.D. Ga. June 30, 2006).)

Plaintiffs impermissibly seek reconsideration of this Court's treatment of non-controlling authority. In the Tenth Circuit, however, even the misapprehension of persuasive authority – such as the American Derivates and Williams cases – is not cause for reconsideration. Rather, a motion for reconsideration may be heard when "the court has misapprehended ... the controlling law." Servants of Paraclete, 204 F.3d at 1012. Here, Plaintiffs do not argue that this Court misapprehended mandatory authority. In fact, under the controlling Federal Rules, this Court was well within its discretion to issue an order tailoring discovery to the particular circumstances of a case. Fed. R. Civ. P. 26(b)(1) advisory com. note (2000) (particularly in the event of "sweeping or contentious discovery," a court may regulate the breadth of discovery). Plaintiffs cannot seek reconsideration on grounds that the Court deviated from the unpublished holdings of a sister district, particularly one outside the Tenth Circuit. See Servants of Paraclete, 204 F.3d at 1012.

Moreover, contrary to Plaintiffs' contention, both Williams and American Derivatives actually support this Court's document production ruling. While those cases held that the particular producing parties must either direct the other party to the file locations where

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[4] As Plaintiffs' motion does not take issue with the other cases utilized in the aspect of the May 17 Order addressing document production, this Response does not address the Court's correct application of those authorities.

documents responsive to each specific request could be found or provide a key or index to assist in locating the documents responsive to each request, the producing party retained "'an obligation to organize the documents in such a manner that [the requesting party] may obtain, with reasonable effort, the documents responsive to their requests.'" Am. Derivatives, 2007 WL 1020838, at *5 (quoting Williams, 2006 WL 183543, at *7 (brackets in original)). Thus, the court cautioned that if a filing system were so disorganized as to prevent meaningful review of requested documents, the court would compel production organized and specifically labeled to respond to discovery requests. Id. (citing Williams, 2006 WL 183543, at *7). The court emphasized that "a party 'may not excuse itself from compliance with Rule 34 ... by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition.'" Id.; Williams, 2006 WL 183543, at *7) (each quoting Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976)). Moreover, each case "emphasized that if the producing party were to be 'overly generous' in identifying responsive documents so as to unduly burden" the requesting party, the court would "require that documents be organized and specifically labeled as responsive to particular requests." Am. Derivatives, 2007 WL 1020838, at *5 (quoting Williams, 2006 WL 183543, at *7).

In other words, the Northern District of Georgia cases hold that if a document production system results in undue burden on the propounding party, the producing party will be required to rectify the situation. At its base, Rule 34 attempts to achieve the fair production of documents, leaving district courts to fashion remedies to suit particular cases.

This Court likewise fashioned a well-reasoned and fair remedy to the parties' document production disputes. Plaintiffs should accept that ruling as the law of this case.

D. Plaintiffs cannot willfully produce unresponsive material.

Plaintiffs also seek reconsideration of the Court's mandate that the parties produce only responsive information, and assert without citation to legal support that they "may produce incidental unresponsive information to the extent that it is contained in the responsive working files of the agencies as they are kept in the usual course of business." (Mot. for Reconsid. at 3, 10-11.) In its Rule 34 holding, this Court correctly cautioned that "[i]nclusion of nonresponsive documents clearly violates the letter and spirit of the rule." (Order of May 17 at 7.) Similarly, the District of Utah recently found that although the Federal Rules allow a party to produce documents as they are kept in the usual course of business, a party remains "obligated to sort through the documents himself and then produce only those responsive to the document requests." Magnesium Corp., 2006 WL 2222358, at *6.

In addition to legal error, Plaintiffs' argument is factually false; Plaintiffs continue to represent that the "only" other unresponsive, non-IRW information at issue originates from counties partly within the IRW. (Mot. for Reconsid. at 10-11.) CTP request for production no. 40 seeks documents relating to allegations of increased human health risks within the IRW. Although Plaintiffs' chart indicated that 62 of the total 68 boxes produced by the Oklahoma Water Resources Board ("OWRB") were responsive to this request, the Cargill Defendants found numerous documents in those 62 boxes having nothing to do with the IRW or the counties in the IRW, including:

- a report on a zinc corporation in Bartlesville, which is outside the IRW counties (Ex. F);
- commentary from the journal Nature entitled "EPA Science: Casualty of Election Politics," (Ex. G);
- a memo regarding Koch Oil litigation in Houston, Texas and oil pipelines and spills outside of Oklahom (Ex. H);
- e-mail regarding writing an amicus curiae brief in a Michigan property rights lawsuit (Ex. I); and

Similarly, CTP request for production no. 56 seeks documents supporting Plaintiffs' contention that hormones or hormonal supplements are provided to poultry grown in the IRW. Plaintiffs' chart indicates that, among other boxes, Oklahoma Conservation Commission ("OCC") boxes 1A, 9, and 13A are responsive to no. 56. In their review of these three OCC boxes, the Cargill Defendants have found no documents supporting Plaintiffs' contention that hormones or hormonal supplements are provided to poultry grown in the IRW.

Consequently, although Plaintiffs insist that they "will not and ha[ve] not put unresponsive information in [their] production in order to confuse the defendants or hide the responsive documents" (Mot. to Reconsid. at 4), such confusion and obfuscation is in fact the result. The bottom line is that Plaintiffs' method of production – with volumes of documents in boxes in no discernible order and with general, inaccurate lists regarding the contents of the boxes – creates confusion and obscures responsive documents. As described in the original briefing, this manner of production makes it impracticable to determine which documents are responsive to which request for production, leaving the Cargill Defendants not only unfairly burdened, but also deprived of a means to confirm whether Plaintiffs

actually produced all responsive documents.[5] Further, as described in the Cargill Defendants' post-hearing briefing and in Magnesium Corp., Rule 34(b) allows responsive information to be produced as kept in the usual course of business – not as a huge undifferentiated mix of unresponsive and responsive materials.

E. Plaintiffs' alleged burden is the result of their risky choice.

Plaintiffs also now claim that producing documents as ordered by this Court is overly burdensome and disruptive to the public agencies involved. (Mot. for Reconsid. at 7-9.) Plaintiffs attempt to meet their burden of proof though affidavit testimony similar to that they offered in response to the Cargill Defendants' underlying motion. (Compare Mot. to Reconsid. Exs. 1-4 to Pls.' Resp. to Mot Compel Exs. 1-4, Doc. No. 1086). As explained in the Cargill Defendants' underlying Reply (Doc. No. 1112), the original affidavits did not cure the deficiencies in Plaintiffs' document production. Insofar as the new affidavits "advanc[e] new arguments or supporting facts which were otherwise available for presentation" when the original motion was made, they are inappropriate and must fail. See Van Skiver, 952 F.2d at 1243.

To the extent the earlier affidavits conflict from these latest affidavits, such conflict must occasion a degree of suspicion. For example, the OCC's new affiant Joann Stevenson maintains that the agency "made more than a good faith effort in providing the poultry industry with every responsive document that was sought in the request [sic] for documents,"

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[5] Plaintiffs' repeated claim that the Cargill Defendants have not stated they were missing responsive information (see Mot. for Reconsid. at 5, 7) is disingenuous. The Cargill Defendants have consistently asserted their inability to determine whether all responsive materials had been produced. (E.g., Cargill Defs.' Mot. Compel at 7, Doc. No. 1054.)

(Mot. for Reconsid. Ex. 2 ¶ 8) despite the fact that the original affiant Ben Pollard, who supervised the OCC document collection, testified in his deposition that he had never seen the Cargill Defendants' discovery requests. (Reply in Supp. Mot. Compel at 3 (Doc. No. 1112) (citing Pollard Dep. at 113:4–115:8).) The agency's deponent on the Water Quality Division document production, Shannon Phillips, likewise testified that she had not seen any discovery other than that of Defendant Peterson, and did not know if the documents OCC produced were actually responsive to any other Defendants' requests. (Id. (citing Phillips Dep. at 117:2-11).)

Ed Fite's new affidavit for the OSRC avers that he "went over the Requests with the OAG item by item and identified documents responsive to each Request, as well as participating in assembling the documents in a central location to facilitate review by the attorneys for the State, as well as attorneys for the Poultry Integrators." (Mot. for Reconsid. Ex. 4 ¶ 3.) He further claims that the OSRC "made an extraordinary effort to provide the poultry industry with every responsive document that was sought in the RFPs." (Id. ¶ 9.) However, Mr. Fite testified in his deposition that he had not read or reviewed the Cargill Defendants' interrogatories or document requests, and was not involved in producing or pulling documents responsive to the Cargill Defendants' discovery requests. (Reply in Supp. Mot. Compel at 2-3 (Doc. No. 1112) (citing Fite Dep. at 155:16-21, 154:12-18).) If Mr. Fite has indeed undergone a new review and categorization of the Cargill Defendants' specific discovery requests since his February 2007 deposition, he should provide that supplementation to the Cargill Defendants.

In opining on the burden to the OWRB should it comply with the May 17 Order, affiant Dean Couch complains of having to "review [] each and every interrogatory and

Request for Production ..." (Mot. for Reconsid. Ex. 2 ¶ 10.) However, Mr. Couch was the only agency affiant to testify that he believed he had received copies of all of the Defendants' discovery requests. (Reply in Supp. Mot. Compel at 2-3 (Doc. No. 1112) (citing Couch Dep. at 194:9-13).) More importantly, Mr. Couch complains of having to review "each and every document that contains information about watersheds that are outside the Illinois River Watershed ... to avoid further motions to compel or sanctions ..." (Id.) As explained above, Plaintiffs maintained both at the hearing of April 27 and in the instant motion that "the only 'unresponsive' documents that will be produced ... are: (1) documents referring to locations outside the watershed, but within the counties encompassing the IRW," and "incidental" documents. (Mot. for Reconsid. at 10.) If so, such weeding by the OWRB should be easy. If, however, Plaintiffs made the strategic choice to include unresponsive information – such as OWRB documents from across Oklahoma – rather than limit their production, they cannot now fairly complain about having to sift through a bog of irrelevant information they opted to produce.

The original ODEQ affiant, Rhonda Craig, stated she "supervised the collection of documents which were responsive to the Poultry Integrator's Interrogatories and Requests for Production of Documents which were served on ODEQ," (Doc. No. 1086, Ex. 1 ¶ 2) although the Cargill Defendants never served discovery requests on ODEQ. Plaintiffs' new ODEQ affiant, Barbara Rauch, who presumably worked with Ms. Craig in the document collection, ambiguously represents that she "personally read the Defendant's [sic] Request [sic] for Production and worked with the Manager of the Central Records to ensure all responsive information had been produced for the defendants [sic]." (Mot. for Reconsid. Ex. 1 ¶ 1) Ms. Rauch further declares that "[e]ach Request for Production was answered with

specificity by the box number(s) and file number." (Id. ¶ 9.) If that statement were accurate, the Cargill Defendants would have no quarrel with the ODEQ's document production because the agency would have already complied with the spirit of this Court's Order of May 17. Rather, the ODEQ did not so answer the Cargill Defendants' requests – the agency's charts provide no file information. (See Ex. E.)

Plaintiffs chose their method of production and must bear the burden of that choice. No newly drafted after-the-fact affidavits can change that reality. Plaintiffs must rectify the confusion they created by producing massive amounts of irrelevant and relevant warehoused and office documents that do not respond particularly to the Cargill Defendants' requests, and that they exacerbated with an inaccurate set of charts. The Order of May 17 instituted a well-reasoned and well-balanced remedy to this problem. The Court should reject Plaintiffs' request for reconsideration.

II. Plaintiffs' Proposed Solution Is Unfair and Unworkable.

Plaintiffs improperly assert a purportedly "more sensible" alternative to the Court's ruling on document production. (Mot. for Reconsid. at 3, 9-10.) As explained above, Plaintiffs cannot on a motion for reconsideration advance arguments that could have been raised in the original briefing. See Van Skiver, 952 F.2d at 1243. More importantly, the proposal is unworkable.

Plaintiffs' proposal would effectively revert the parties to their pre-motion meet and confer process, with the burden shifted back onto the Cargill Defendants to demonstrate again the insufficiency of Plaintiffs' responses. (See id. at 3, 9: "the Cargill Defendants [should] be required to allege with specificity any errors they perceive in the State's ... indices and the State will review the identified entries and correct them where

appropriate ...") Plaintiffs' suggestion provides them the power to accept or reject the Cargill Defendants' view, despite the fact that the Cargill Defendants demonstrated that Plaintiffs have failed to fully comply with the Federal Rules on discovery. Hence, the proffered approach would in no way save the Cargill Defendants "time, expense, and inconvenience" (id. at 9), but would rather cost exponentially more time and expense while creating exponentially more inconvenience.

This motion is the second time Plaintiffs have sought reconsideration of rulings compelling them to produce discovery required under the Federal Rules, and represents a pattern of avoiding timely compliance with discovery orders. For example, Plaintiffs informed the Cargill Defendants that they would not comply with the document production deadline of June 16. Plaintiffs' inability to comply with the June 16 mandate is solely of their own making; had they utilized a sufficient production method at the outset or even began moving toward compliance on May 17 when this Court's Order issued, they would not be in this position.

Additionally, the Order of May 17 memorialized Plaintiffs' agreement on the record to abide by the Court's February 28 and April 4 rulings regarding Rule 33(d) document production by Friday, June 1, 2007. (Order of May 17 at 2.) After the close of business on June 1, Plaintiffs did serve supplemental interrogatory responses. However, Plaintiffs' "supplementation" of Cargill, Inc. interrogatory nos. 2, 3, 4, 6 and 16 and CTP interrogatory nos. 2, 6, 13, and 15 was actually to withdraw their Rule 33(d) designation and instead state their mere intent to supplement their response "as responsive information is identified." (See Exs. J- K.) The end result is that Plaintiffs answered these five interrogatories with even less information than before, in contradiction of the letter and spirit of three different discovery

orders by this Court. (See Ex. L.) Plaintiffs' proffered supplementation of their responses to Cargill interrogatory nos. 9 and 13 – which the Court held were initially inadequate for failure to "describe[e] with particularity each instance of which Plaintiff has knowledge where a Cargill entity has" both "used poultry waste disposal practices in violation of federal and state laws and regulations" (for no. 9) and "created or maintained a nuisance in the State of Oklahoma" (for no. 13) – likewise fail. (See Order of May 17 at 8-9.) The supplemental responses continue to suffer from the original defect by failing to provide any particular information about what the Cargill Defendants allegedly did or did not do. (See Exs. J, K and L.)

The Order also requires the parties to meet and confer to schedule document production at the four remaining agencies identified in Plaintiffs' responses to the Cargill Defendants' discovery requests. (Order of May 17 at 11.) Plaintiffs have made documents available at the OSRC, but despite the Order and the Cargill Defendants' repeated requests, Plaintiffs have not provided production dates for the remaining identified agencies. (See Ex. M.)

This Court should reject this and any future attempt by Plaintiffs to delay and impede the discovery process and should deny the motion for reconsideration in its entirety. For all the above reasons, the Cargill Defendants respectfully request that the Court uphold the well-founded Order of May 17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 18th day of June, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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